

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER 97-0287 ST
SALES AND USE TAX

For Tax Periods: 1993 Through 1995

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ISSUES

1. Tax Administration-Records

Authority: IC 6-8.1-5-1(b), IC 6-8.1-5-4.

Taxpayer protests the numbers used in determining the assessment.

2. Sales and Use Tax-Deli Trays

Authority: IC 6-2.5-5-20, Information Bulletin 29 dated July 1, 1994, *Beasley v. Kwatnez* 445 NE2d 1028 (Ind. App. 1983).

Taxpayer protests the assessment of tax on deli trays.

STATEMENT OF FACTS

Taxpayer is an individual who owns and operates an unincorporated delicatessen. The delicatessen is open for business from 10:00 a.m. until 2:00 p.m. on Monday through Friday. On Saturday the delicatessen is open for both breakfast and lunch. The delicatessen also has delivery and catering services. Additional sales and use tax was assessed after a routine audit. Taxpayer protested the assessment. Further facts will be provided as necessary.

1. Tax Administration-Records

IC 6-8.1-5-1 (a) provides for the assessment of additional sales and use taxes as follows:

If the department believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the unpaid tax on the basis of the best information available to the department.

In this instance, the Indiana Department of Revenue audited Taxpayer's records. Those records consisted of 1991 - 1995 federal tax returns, and a small amount of other records such as sheets of paper with unverified numbers handwritten on them and deposit slips for part of the tax period. The records did not include any cash register receipts or any source documents to verify income other than the few deposit slips. IC 6-8.1-5-4 (a) requires that all taxpayers "keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records."

The records kept by Taxpayer did not satisfy the statutory requirement that they be adequate for determination of the proper amount of tax due. The auditor calculated the assessment by determining that the dollar amount of the Cost of Goods sold was materially correct as reported. The auditor then relied on reference materials to determine that the cost of goods sold in the industry were 42.8% of sales. The auditor stated that it was well known that the taxpayer makes a generous sandwich when it comes to fillings such as meats and cheeses. Therefore it was determined that 70% would be allowed for cost of goods sold. This is 27.2% higher than the standard index and 10% below Taxpayer's estimates. Therefore the notice of proposed assessment reflects the best information available to the Auditor at the time of the audit.

IC 6-8.1-5-1 (b) provides as follows:

. . .The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid, and the burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

Taxpayer was unable to present additional documentation at the hearing or in a reasonable period after the hearing to demonstrate that the proposed assessment was incorrect. Therefore Taxpayer did not uphold its burden of proof.

FINDING

The first point of protest is denied.

2. Sales and Use Tax-Deli Trays

DISCUSSION

The audit assessed gross retail tax on Taxpayer's sales of deli or party trays. Taxpayer contends that one-half of the delicatessen's sales are deli trays and entitled to exemption as "food for human consumption" pursuant to IC 6-2.5-5-20. Information Bulletin 29, dated July 1, 1994, which was in effect during the tax period specifically interprets this statute as imposing the gross retail tax on deli trays.

Tax exemptions in Indiana are strictly construed against the exemption and in favor of taxation. *Beasley v. Kwatnez*(1983), Ind. App. , 445 N.E.2d 1028. Even if deli trays had been interpreted as qualifying for the food for human consumption exemption during the tax period, Taxpayer would have the burden of proving that it was entitled to an exemption from the tax for deli trays.

Taxpayer's records were insufficient to determine the amount of sales that resulted from the sales of deli or party trays as opposed to all other sales. Taxpayer claimed that she knew the names of the persons who purchased such trays during the tax period. No documentation of these names were produced. Since Taxpayer's records were inadequate to determine the proper amount of sales entitled to the "food for human consumption" exemption, Taxpayer would not have fulfilled its burden of proving that it was entitled to the "food for human consumption" exemption for part of the sales even if deli trays were considered exempt as "food for human consumption" or that the proposed notice of assessment was incorrect.

FINDING

Taxpayer's protest to the assessment of gross retail tax on deli trays is denied.